STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 24, 2007
v	No. 269102 Wayne Circuit Court
DANA KENNEDY, Defendant-Appellant.	LC No. 05-012004-01

Before: White, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree premeditated murder, MCL 750.316(1)(a), assault with intent to murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b(1). He was sentenced to mandatory life imprisonment for the murder conviction, twenty-five to eighty years' imprisonment for the assault conviction, and three to five years' imprisonment for the felon-in-possession conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant first asserts that he is entitled to an evidentiary hearing on his motion for new trial based on the newly discovered evidence that a jailhouse informant who testified against him committed perjury, and has recanted. To be entitled to a new trial on the basis of newly discovered evidence, a defendant must show (1) that the evidence, not merely its materiality, was newly discovered, (2) that the new evidence is not cumulative, (3) that the defendant could not have, by the use of reasonable diligence, discovered and produced the evidence at trial, and (4) that the new evidence would make a different result probable on retrial. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003).

On appeal, defendant has submitted two affidavits from the jailhouse informant in which the informant avers that he entered defendant's jail cell and read defendant's discovery materials, that he used these materials to fabricate his testimony at trial, and that the prosecutor and the police promised him consideration in exchange for his testimony against defendant. Although these affidavits were not presented below, we properly may consider them to determine whether remand for an evidentiary hearing might be warranted. See MCR 7.211(C)(1).

The affidavits provide facial support for defendant's claim that newly discovered evidence exists, that the evidence is not cumulative, and that defendant could not have

discovered the new evidence before trial by the use of reasonable diligence. However, the new evidence would not make a different result probable on retrial. The nature of the evidence is recantation testimony. Such evidence is traditionally regarded as inherently suspect and untrustworthy. *People v Canter*, 197 Mich App 550, 559-560; 496 NW2d 336 (1992). The evidence of witness intimidation that was presented at trial further undermines the trustworthiness of this evidence. More significantly, the informant's testimony was not the principal evidence against defendant. An eyewitness unequivocally testified at trial that he clearly saw defendant and was certain that defendant was the shooter. Further, there was evidence that defendant had a plan to eliminate the victim and his friends from competition in the sale of drugs. For these reasons, we conclude that the newly discovered evidence would not make a different result probable on retrial, and that there is no need to remand for a hearing. Accordingly, appellate relief is not warranted.

Defendant next argues that the prosecutor deprived him of due process by intentionally withholding evidence of consideration provided to the jailhouse informant in exchange for his testimony against defendant. In support of this claim, defendant has presented the affidavit of the jailhouse informant, who averred that the prosecutor promised to reduce an armed robbery charge in exchange for his testimony.

Constitutional claims of due process violation are reviewed de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997). Under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), "[a] criminal defendant has a due process right of access to certain information possessed by the prosecution." *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). "This due process requirement of disclosure applies to evidence," i.e., "evidence that might lead a jury to entertain a reasonable doubt about a defendant's guilt." *Id*. "Impeachment evidence as well as exculpatory evidence falls within the *Brady* rule because, if disclosed and used effectively, such evidence 'may make the difference between conviction and acquittal.'" *Id*. at 281, quoting *United States v Bagley*, 473 US 667, 676; 105 S Ct 3375; 87 L Ed 2d 481 (1985).

"In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *Lester*, *supra* at 281-282.

"The failure to disclose impeachment evidence does not require automatic reversal even where . . . the prosecution's case depends largely on the credibility of a particular witness." *Id*. at 282. Rather, "[t]he court still must find the evidence material," i.e., that there is a reasonable probability that, if disclosed, the evidence might have affected the outcome. *Id*. Generally, "impeachment evidence has been found to be material where the witness at issue supplied the only evidence linking the defendant to the crime or where the likely effect on the witness' credibility would have undermined a critical element of the prosecution's case." *Id*. at 282-283. "In contrast, a new trial is generally not required where the testimony of the witness is corroborated by other testimony or where the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable." *Id*. at 283.

To the extent that defendant intends his brief on appeal to serve as a motion to remand under MCR 7.211(C)(1), we properly may consider the informant's affidavit for this purpose. According to the affidavit, the prosecutor promised to reduce the informant's armed robbery charges in exchange for his testimony. Even if defendant can satisfy the first three prongs of the *Brady* test, however, he has not shown a reasonable probability that the outcome of his trial would have been different had this alleged evidence been disclosed. As discussed previously, the jailhouse informant's testimony was not the only evidence supporting the conviction. Rather, another eyewitness testified that he observed the shooting, saw defendant clearly, and that he was certain that defendant was the shooter. In light of the testimony of this eyewitness, defendant has failed to establish a reasonable probability that the outcome of his trial would have been different had this alleged evidence been disclosed.

Defendant next argues that the trial court abused its discretion in allowing other bad acts evidence. Defendant does not challenge the substantive admissibility of this evidence under MRE 404(b), but only argues that the prosecution failed to provide reasonable notice of its intent to use the evidence at trial, and failed to show good cause for the delay in notice.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). An abuse of discretion occurs only when the trial court's decision falls outside the range of "reasonable and principled outcome[s]." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

MRE 404(b)(2) states:

> The prosecution in a criminal case shall provide *reasonable notice* in advance of trial, *or during trial if the court excuses pretrial notice on good cause shown*, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination. [Emphasis added.]

The purposes of the notice requirement "are (1) to force the prosecutor to identify and seek admission only of prior bad acts evidence that passes the relevancy threshold, (2) to ensure that the defendant has an opportunity to object to and defend against this sort of evidence, and (3) to facilitate a thoughtful ruling by the trial court that either admits or excludes this evidence and is grounded in an adequate record." *People v Hawkins*, 245 Mich App 439, 453, 455; 628 NW2d 105 (2001).

Under the plain language of the rule, the prosecution need only provide "reasonable notice in advance of trial." MRE 404(b)(2). Here, the prosecutor's motion was argued two days before trial. At the hearing, defense counsel admitted receiving prior notice of the prosecution's motion and brief. Contrary to defendant's assertion, the trial court did not require defendant to make a showing of prejudice. Because defendant does not dispute the substantive admissibility of the evidence under MRE 404(b), this case does not implicate a concern that, without reasonable notice, the prosecutor may have been permitted to introduce inadmissible evidence of other bad acts. Nor is there any indication that earlier notice would have had any effect on

whether the trial court would have admitted the evidence at trial. See *Hawkins*, *supra* at 455. Additionally, defendant does not explain what he would have done differently, had he received notice earlier. *Id*. at 455. Defendant also failed to seek an adjournment to prepare to meet the evidence. For these reasons, we reject this claim of error.

Lastly, defendant argues that the trial court erred in admitting evidence of his flight to Georgia, and in instructing the jury that evidence of flight could be used to infer consciousness of guilt. We disagree.

We review the trial court's evidentiary decision for an abuse of discretion, *Smith*, *supra* at 550, and review the claim of instructional error de novo, *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). "Michigan recognizes the equivocal nature of evidence of flight; however, evidence of flight is generally relevant and admissible." *People v Cutchall*, 200 Mich App 396, 398; 504 NW2d 666 (1993), disapproved in part on other grounds, *People v Edgett*, 220 Mich App 686, 692; 560 NW2d 360 (1996). "[I]t is always for the jury to say whether it is under such circumstances as to evidence guilt." *Id*. at 398, quoting *People v Cipriano*, 238 Mich 332, 336; 213 NW 104 (1927). Flight can be evidence of "purpose, intent, or knowledge." *People v Clark*, 124 Mich App 410, 413; 335 NW2d 53 (1983). Thus, "[e]vidence of flight is admissible where relevant and material." *Id.*

In this case, defendant left Michigan after the shooting. He was arrested and released in Philadelphia, Pennsylvania, and was later rearrested in Georgia, and extradited to Michigan. Defendant testified that he had friends and family in Georgia, but did not testify regarding the reasons for his trip. The evidence was admissible for the purpose of allowing the jury to determine whether defendant fled from Michigan to avoid being arrested, and whether his flight was evidence of consciousness of guilt. Thus, the trial court did not abuse its discretion in allowing the evidence.

The trial court instructed the jury that evidence of flight was not evidence of guilt, that persons may flee for innocent reasons such as panic, mistake, or fear, or because of consciousness of guilt. The court instructed the jury to decide whether the evidence was true, and if so, whether it showed that defendant had a guilty state of mind. This instruction is consistent with CJI2d 4.4, and constitutes an accurate statement of the law. See *People v Taylor*, 195 Mich App 57, 63-64; 489 NW2d 99 (1992). Accordingly, there was no error.

Affirmed.

/s/ Helene N. White
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood